

SENATE No. 1653

The Commonwealth of Massachusetts

PRESENTED BY:

Cynthia Stone Creem

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act to improve the spousal elective share.

PETITION OF:

NAME:

Cynthia Stone Creem

DISTRICT/ADDRESS:

First Middlesex and Norfolk

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE SENATE, NO. S00891 OF 2007-2008.]

The Commonwealth of Massachusetts

In the Year Two Thousand and Nine

AN ACT TO IMPROVE THE SPOUSAL ELECTIVE SHARE.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Section 15 of Chapter 191 of the general laws, as appearing in the 2006
2 Official Edition, is hereby amended by inserting in place thereof the following:-

3 “DEFINITIONS. When used in this section the following words or terms shall have, unless the
4 context clearly indicates otherwise, the following meaning:

5 (a) “Beneficiary” – a beneficiary of the decedent’s probate estate or of a trust holding property
6 included in the elective estate, including a nominee or realty trust.

7 (b) “Decedent’s nonprobate transfer to others” – the types of transfers specifically included in the
8 elective estate under paragraphs (c)(2) and (3) of this section.

9 (c) “Elective estate” – all property, whether real or personal, movable or immovable, tangible or
10 intangible, wherever situated, that constitutes the decedent’s net probate estate, the decedent’s
11 nonprobate transfers to others, and the decedent’s nonprobate transfers to the surviving spouse,
12 reduced by all property excluded from the elective estate, determined as follows:

(1) The decedent's net probate estate is the decedent's probate estate reduced by funeral and administration expenses, homestead allowance, family allowances, exempt property, and enforceable claims.

(2) The decedent's nonprobate transfers to others include any of the following types to persons or entities other than the surviving spouse, in the amount provided respectively for each type of transfer:

(i) Property owned or owned in substance by the decedent immediately before death that passed outside probate at the decedent's death, including:

(aa) Property over which the decedent alone, immediately before death, held a presently exercisable general power of appointment. The amount included is the value of the property subject to the power, to the extent the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse.

(bb) The decedent's fractional interest in property held by the decedent in joint tenancy with the right of survivorship. The amount included is the value of the decedent's fractional interest, to the extent the fractional interest passed by right of survivorship at the decedent's death to a surviving joint tenant other than the decedent's surviving spouse.

(cc) The decedent's ownership interest in property or accounts held in pay-on-death form, transfer-on-death form, or co-ownership registration with the right of survivorship. The amount included is the value of the decedent's ownership interest, to the extent the decedent's ownership

interest passed at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

(dd) Insurance on the decedent's life as to which the decedent, either alone or in conjunction with any other person, owned any of the economic benefits of the policy, including the power to change the beneficiary, to surrender or cancel the policy, to assign the policy, to revoke an assignment, to pledge the policy for a loan, or to obtain from the insurer a loan against the surrender value of the policy, or owned a reversionary interest in the policy or its proceeds, whether arising by the express terms of the policy or other instrument or by operation of law, but only if the value of the reversionary interest immediately before the death of the decedent exceeded five percent of the value of the policy. The amount included is the value of the proceeds, to the extent they were payable at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

(ii) Property transferred in any of the following forms by the decedent during marriage:

(aa) Any irrevocable transfer in which the decedent retained the right to the possession or enjoyment of, or to the income from, the property if and to the extent the decedent's right terminated at or continued beyond the decedent's death. The amount included is the value of the fraction of the property to which the decedent's right related, to the extent the fraction of the property passed outside probate to or for the benefit of any person other than the decedent's estate or surviving spouse.

(bb) Any transfer in which the decedent created a power over income or property, exercisable by the decedent alone or in conjunction with any other person, or exercisable by a nonadverse party,

to or for the benefit of the decedent, creditors of the decedent, the decedent's estate, or creditors of the decedent's estate. The amount included with respect to a power over property is the value of the property subject to the power, and the amount included with respect to a power over income is the value of the property that produces or produced the income, to the extent the power in either case was exercisable At the decedent's death to or for the benefit of any person other than the decedent's surviving spouse or the extent the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse. If the power is a power over both income and property and the preceding sentence produces different amounts, the amount included is the greater amount.

(iii) Property that passed during marriage and during the one year period next preceding the decedent's death as a result of a transfer by the decedent for less than full and adequate consideration if the transfer was of any of the following types:

(aa) Any property that passed as a result of the termination of a right or interest in, or power over, property that would have been included in the elective estate under paragraph (2)(i)(aa), (bb), or (cc), or paragraph (2)(ii), of this section 1(c) if the right, interest, or power had not terminated until the decedent's death. The amount included is the value of the property that would have been included under those paragraphs if the property were valued at the time the right, interest, or power terminated, and is included only to the extent the property passed upon termination to or for the benefit of any person other than the decedent or the decedent's estate, spouse, or surviving spouse. As used in this subparagraph "termination", with respect to a right or interest in property, occurs when the right or interest terminated by the terms of the governing

instrument or the decedent transferred or relinquished the right or interest, and, with respect to a power over property, occurs when the power terminated by exercise, release, lapse, default, or otherwise, but, with respect to a power described in paragraph (2)(i)(aa), “termination” occurs when the power terminated by exercise or release, but not otherwise.

(bb) Any transfer of or relating to an insurance policy on the life of the decedent if the proceeds would have been included in the elective estate under paragraph (2)(i)(dd) of this section 1(c) had the transfer not occurred. The amount included is the value of the insurance proceeds to the extent the proceeds were payable at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

(cc) Any transfer of property, to the extent not otherwise included in the elective estate, made to or for the benefit of a person other than the decedent's surviving spouse. The amount included is the value of the transferred property to the extent the aggregate transfers to any one donee in any calendar year falling within the one year period exceeded \$10,000.

(3) The decedent's nonprobate transfers to the surviving spouse consist of all property that passed outside probate from the decedent to the surviving spouse at the decedent's death or by reason of the decedent's death, excluding property passing to the surviving spouse under the federal social security system. The decedent's nonprobate transfers to the surviving spouse include any of the following types of transfers, in the amount provided respectively for each type of transfer:

(i) the decedent's fractional interest in property held as a joint tenant with the right of survivorship, to the extent that the decedent's fractional interest passed to the surviving spouse as surviving joint tenant;

ii) the decedent's ownership interest in property or accounts held in co-ownership registration with the right of survivorship, to the extent the decedent's ownership interest passed to the surviving spouse as surviving co-owner; and

(iii) all other property that would have been included in the elective estate under paragraphs (2)(i) or (ii) of this section 1(c) had it passed to or for the benefit of a person other than the surviving spouse, the decedent, or the decedent's creditors, estate, or estate creditors.

(4) The value of property included in the elective estate is reduced in each category by enforceable claims against the included property.

(5) In case of overlapping application to the same property of the paragraphs or subparagraphs of this section including property in the elective estate, the property is included in the elective estate under the provision yielding the greatest value, and under only one overlapping provision if they all yield the same value.

(6) The following types of property are excluded from the elective estate:

(i) Any of the decedent's nonprobate transfers to others to the extent the decedent received adequate and full consideration in money or money's worth for the transfer.

(ii) Any property (or any interest in property) as to which the surviving spouse has relinquished his or her right of election pursuant to a written instrument complying with the provisions of section 10 of this chapter.

(iii) Interests in community property arising under the community property laws of other states.

(iv) Any interest in the decedent's principal residence when such interest was conveyed by the decedent to or for the benefit of any one or more of the issue of the surviving spouse at a time when the surviving spouse was incapacitated as defined in section 3 of this chapter.

(v) Any property held in trust for the benefit of a disabled child or grandchild of the surviving spouse.

(vi) The decedent's nonprobate transfers to others as defined in paragraph (2) of this section I (c) that were irrevocable before the enactment date of this chapter.

(7) For purposes of this chapter, all property included in the elective estate shall be valued at its fair market value as of the date of the decedent's death, except that property included in the elective state under paragraph (2)(iii)(cc) of this section I(c) shall be valued at its fair market value as of the date of the transfer.

(d) "Fractional interest in property held in joint tenancy with the right of survivorship" whether the fractional interest is unilaterally severable or not, the fraction, the numerator of which is one and the denominator of which, if the decedent was a joint tenant, is one plus the number of joint

tenants who survive the decedent and which, if the decedent was not a joint tenant, is the number of joint tenants.

(e) "Fraudulent transfer"- any payment of money, assignment, release, transfer, mortgage or pledge of, or the creation of a lien or encumbrance upon, an asset included in the elective estate that is fraudulent under chapter 109A as to the surviving spouse as a creditor by virtue of this chapter. For purposes of determining whether the person making the transfer or entering into the obligation is or will be thereby rendered insolvent, the transfer shall be deemed to have been made or the obligation shall be deemed to have been entered into at the time such person's debt to the surviving spouse is determined by the court under section 7 of this chapter.

(f) "Governing instrument"- a deed; a will; a trust; an insurance or annuity policy; a pension, profit-sharing, retirement, or similar benefit plan; a contract governing a certificate of deposit or checking, savings, mutual fund, money market, brokerage, custody, agency, or any other financial or depository account; or a security registered with a designated recipient to take upon the death of the owner.

(g) "Marriage"- with respect to a transfer by the decedent during marriage, any marriage of the decedent to the decedent's surviving spouse.

(h) "Nonadverse party"- a person who does not have a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or nonexercise of the power that he or she possesses respecting the trust or other property arrangement. A person having a general power of appointment over property is deemed to have a beneficial interest in the property.

153 (i) "Original recipient"- a person or entity other than a payor that has received or has the right to
154 receive property included in the elective estate:

155 (1) from the decedent by lifetime transfer;

156 (2) as a personal representative or trustee, including a trustee of a nominee or realty trust;

157 or

158 (3) from a payor or by operation of law by reason of the decedent's death.

159 (j) "Payor"- an insurer, business entity, employer, government, governmental agency or
160 subdivision, or any other person obligated by law or a governing instrument to make payments,
161 excluding a personal representative or a trustee of property included in the elective estate.

162 (k) "Personal representative"- the executor, administrator, administrator with the will annexed,
163 special administrator, temporary executor, temporary administrator with the will annexed, or
164 administrator de bonis non of the decedent's estate in Massachusetts, or if none, any person in
165 actual or constructive possession of any property included in the elective estate.

166 (l) "Power" or "power of appointment"- includes a power to designate the beneficiary of a
167 beneficiary designation.

168 (m) "Presently exercisable general power of appointment" a power of appointment under which,
169 at the time in question, the decedent, whether or not he or she then had the capacity to exercise
170 the power, held a power to create a present or future interest in himself or herself, his or her
171 creditors, his or her estate, or creditors of his or her estate, including a power to revoke or invade
172 the principal of a trust or other property arrangement.

(n) "Probate estate"- property that would pass by intestate succession if the decedent dies without a valid will.

(o) "Property"- includes values subject to a beneficiary designation.

(p) "Right to income"- includes a right to payments under a commercial or private annuity, an annuity trust, a unitrust, or a similar arrangement.

(q) "Surviving spouse"- a person who was married to the decedent at the time of the decedent's death.

(r) "Third party"- a person or entity other than the decedent and the surviving spouse.

(s) "Transfer"- as it relates to a transfer by or of the decedent, includes (1) an exercise or release of a presently exercisable general power of appointment held by the decedent, (2) a lapse at death of a presently exercisable general power of appointment held by the decedent, and (3) an exercise, release, or lapse of a general power of appointment that the decedent created in himself or herself and of a power described in paragraph (c)(2)(ii)(bb) that the decedent conferred on a nonadverse party.

SECTION 2. ELECTIVE SHARE AMOUNT.

(a) The surviving spouse of a decedent who after the effective date of this chapter dies domiciled in Massachusetts may elect, under the limitations and conditions stated in this chapter, to take outright an elective share amount equal to the greater of (i) fifty thousand dollars (\$50,000) or (11) the value of the elective share percentage of the elective estate, in accordance with the following schedule:

If the duration of the marriage between the decedent and the surviving spouse was:	The Elective share percentage shall be:
Shorter than 5 years	15% of the elective estate
5 years or longer, but shorter than 10 years	25% of the elective estate
10 years or longer but shorter than 15 years	35% of the elective estate
15 years or longer	40 % of the elective share

(b) If the elective share amount provided under paragraph (a) of this section exceeds a maximum equal to one half the sum of (i) the value of the elective estate of the decedent and (ii) the value of the elective estate of the surviving spouse determined and valued as if he or she had died simultaneously with the decedent, the elective share amount shall be reduced to said maximum, except when an election under paragraph (c) of this section has been made.

(c) If at the date of the decedent's death, divorce proceedings between the decedent and the surviving spouse were pending and the parties had executed a written property settlement or the court had entered judgment dividing their property which had not yet become final, the surviving spouse may elect to take under such settlement or judgment, and the rights of the surviving spouse thereunder shall become the elective share amount for purposes of this chapter.

(d) The surviving spouse's homestead allowance, exempt property, and family allowance, if any, shall not be charged against but shall be in addition to the elective share amount, except when an election under paragraph (c) of this section has been made.

(e) No federal or state estate, inheritance, generation skipping, or other taxes arising as a result of the decedent's death shall be allocated to or chargeable against the elective share amount.

SECTION 3. ELECTION PERSONAL TO SURVIVING SPOUSE.

(a) Surviving spouse must be living at time of election. The election provided by this chapter is personal to the surviving spouse, may not be reached by creditors or sold, assigned, or transferred in any manner, other than a relinquishment as provided in section two of this chapter, and may only be made during the lifetime of the surviving spouse. In the case of an incapacitated surviving spouse or a surviving spouse under conservatorship, the election may be made only by the duly appointed conservator or guardian of the surviving spouse based upon a substituted judgment standard.

No surviving spouse, or the conservator or guardian of said surviving spouse shall be compelled to make an election under this chapter nor penalized, disadvantaged, or discriminated against by virtue of the relinquishment of or failure to make an election under this chapter. Relinquishment of election or failure to make an election shall not affect the eligibility of the surviving spouse for benefits or assistance under any governmental program.

(b) Incapacitated or Institutionalized Surviving Spouse. If the election is exercised by or on behalf of a surviving spouse who is incapacitated or institutionalized, determined as of the date of the election, that portion of the elective share amounts due under this chapter must be placed in a custodial trust for the benefit of the surviving spouse under the provisions of chapter two hundred and three B, except as modified below. For purposes of the custodial trust established by

227 this subsection, (i) the electing guardian or conservator is the custodial trustee, provided however
228 that if this election is being made by an institutionalized surviving spouse who is not
229 incapacitated, the duly appointed fiduciary of the deceased spouse's estate shall be the custodial
230 trustee (or such other suitable trustee as may be appointed by the probate court) (ii) the surviving
231 spouse is the beneficiary, and (iii) the custodial trust is deemed to be a trust created by the will of
232 the decedent spouse.

233 (c) Custodial Trust. For the purposes of subsection (b) of this section chapter two hundred
234 and three B shall be applied as if section six (b) thereof were repealed and sections two (e), nine
235 (b), and seventeen (a) were amended to read as follows:

236 (1) Neither an incapacitated nor institutionalized beneficiary nor anyone acting on behalf of an
237 incapacitated or institutionalized beneficiary has a power to terminate the custodial trust; but if
238 the beneficiary regains capacity and is not institutionalized, the beneficiary then acquires the
239 power to terminate the custodial trust by delivering to the custodial trustee a writing signed by
240 the beneficiary declaring the termination. If not previously terminated, the custodial trust
241 terminates on the death of the beneficiary.

242 (2) If the beneficiary is incapacitated or institutionalized, the custodial trustee shall expend so
243 much or all of the custodial trust property as the custodial trustee considers advisable for the use
244 and benefit of the beneficiary and individuals who were supported by the beneficiary when the
245 beneficiary became incapacitated or institutionalized, or who are legally entitled to support by
246 the beneficiary. Expenditures may be made in the manner, when and to the extent that the
247 custodial trustee determines suitable and proper, without court order but with regard to other
248 support, income, and

property of the beneficiary and benefits of medical or other forms of assistance from any state or federal government or governmental agency for which the beneficiary must qualify on the basis of need.

(3) Upon the beneficiary's death, the custodial trustee shall transfer the unexpended custodial trust property in the following order: (i) to or as directed by the person who would have taken under the disposition originally made by the beneficiary's predeceased spouse against whom the elective share was taken or (ii) under the residuary clause, if any, of the will of the beneficiary's predeceased spouse against whom the elective share was taken, as if that predeceased spouse died immediately after the beneficiary; or (iii) to that predeceased spouse's heirs.

As used in this section, the term "incapacitated" shall mean lacking sufficient soundness of mind to (i) understand correctly the nature and situation of the individual's property, properly care for such property, and make informed decisions regarding such property, (ii) understand the nature of the act the individual is committing when the individual enters into or terminates a legal relationship with another person, and (iii) think and act on the individual's own behalf as to matters concerning the individual's personal health, safety, and general welfare. An individual having a duly appointed guardian shall be presumed to be incapacitated.

As used in this section, the term "institutionalized" shall mean being an inpatient in a nursing facility, being an inpatient in a medical institution and receiving the level of care that would be provided in a nursing facility, being an inpatient in an intermediate care facility for the mentally retarded, or requiring the level of care that would be provided in a hospital, nursing facility, or intermediate care facility for the mentally

retarded but for the provision of home or community-based services.

Any dispute regarding whether a surviving spouse is incapacitated or

institutionalized as defined in this section shall be resolved by the probate court.

SECTION 4. PARTIAL ELECTION. A surviving spouse may elect less than all

of his or her elective share amount. To make a partial election, the surviving spouse shall

indicate on his or her petition for an elective share that he or she is making a partial election and

the percentage of the elective share amount elected.

SECTION 5. NOTICE TO SURVIVING SPOUSE.

(a) On or before the day the personal representative of the decedent's estate files his or her petition for appointment, the personal representative shall send by certified mail or delivery to

the decedent's surviving spouse at his or her current address, or if the current address of the

surviving spouse is not known to the surviving spouse's last known address, a written notice that

the surviving spouse may have a right to elect a share of the decedent's estate under chapter 191C

and that the surviving spouse has a right to retain

a lawyer to represent him or her in connection with electing under this chapter. The notice shall

further inform the surviving spouse of his or her right to written disclosure of a description of the

assets and the estimated values of the assets included in the decedent's elective estate as provided

in section 6 of this chapter, and shall inform the surviving spouse of the date by which the

surviving spouse must elect as provided in section 7 of this chapter.

(b) The personal representative shall attach to such notice a copy of chapter 191C. Every petition for probate of a decedent's will or for administration of a decedent's estate indicating that the decedent left a surviving spouse shall include a sworn statement that the notice to the surviving spouse required by this section has been sent by certified mail or delivery. Any personal representative of the decedent's estate may give such notice at any time prior to commencement of a probate proceeding, if any.

SECTION 6. DISCLOSURE TO SURVIVING SPOUSE.

(a) No later than one month after the surviving spouse's written request for disclosure from the personal representative, the personal representative shall, by certified mail or delivery, provide to the surviving spouse the following written information:

(i) a list of the assets and interests included in the elective estate, with each asset or interest identified with particularity;

(ii) an estimate of the fair market value of each listed asset, as of the valuation date set forth in section 1; and

(iii) the information relied upon in making each estimate.

(b) No later than one month after the surviving spouse's written request for disclosure from a person or entity holding property included in the elective estate, the person or entity holding such property shall, by certified mail or delivery, provide to the surviving spouse the following written information:

(i) a list of the assets and interests included in the elective estate and held by that person or entity, with each asset or interest identified with particularity;

(ii) an estimate of the fair market value of each listed asset, as of the valuation date set forth in section 1; and

(iii) the information relied upon in making the estimate.

(c) If a federal estate tax return or any state estate or inheritance tax returns are required under the applicable tax laws, then upon written request of the surviving spouse the personal representative shall provide to the surviving spouse copies of all such tax returns within one month after filing such returns with the Internal Revenue Service or state taxing authority.

(d) In every case where a petition for an elective share has been timely filed, the personal representative shall provide in writing to the surviving spouse the information normally required by a federal estate tax return regarding the assets and the values of the assets included in the decedent's estate, by the later of (i) the due date for filing the federal estate tax return as extended, if an estate tax return is required to be filed, or (ii) three months after the filing of the petition for the elective share.

(e) In the event that any person or entity shall fail to comply with the provisions of this section six within the time specified, that person or entity shall be liable to the surviving spouse for the costs and fees reasonably incurred by the surviving spouse to secure such compliance, unless the court finds that the delay or noncompliance was due to excusable neglect.

SECTION 7. PROCEEDING FOR ELECTIVE SHARE; TIME LIMIT.

329 (a) The election shall be made by filing a petition for the elective share in the court having
330 jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have
331 been commenced, in the court having jurisdiction of probate proceedings in the county where the
332 decedent was last domiciled, not later than the expiration of the earlier of (1) six months after the
333 surviving spouse receives notice in accordance with section 5 or (ii) one year after the decedent's
334 date of death. A copy of the petition or the elective share shall be mailed or delivered to the
335 personal representative (if any) at the time the petition is filed.

336 (b) After notice and hearing, the court shall determine the elective share amount and shall enter
337 judgment ordering its payment as appears appropriate under section 9. In such judgment, the
338 court shall fix the liability of each person or entity required to make contribution toward
339 satisfaction of the elective share amount under section 9.

340 (c) A judgment of the probate court entered under this chapter shall be enforceable in other
341 courts of this state or in other Jurisdictions.

342 (d) A surviving spouse may withdraw or amend the. petition for an elective share at any time
343 before entry of a final determination by the court.

344 (e) If the supreme judicial court, upon a complaint filed by a surviving spouse whose petition for
345 the elective share shall not have been filed within the time limit prescribed in subpart (a) of this
346 section 7, deems that justice and equity require it and that such surviving spouse is not
347 chargeable with culpable neglect in not filing said petition within the prescribed time limits, it
348 may determine the elective share amount and enter

judgment ordering its payment as appears appropriate under section 9; provided, however, forthwith upon the filing of said complaint a notice thereof (in the nature of a lis pendens) shall have been filed in the registry of probate where probate proceedings are pending, or, if none, where the decedent was domiciled at the date of death, provided further that such judgment shall not affect any payment or distribution made before the filing of such complaint and notice.

SECTION 8. EFFECT OF ELECTION.

(a) If the right of election is exercised by or on behalf of the surviving spouse, the surviving spouse's homestead allowance under chapter 188 right to occupy the decedent's house under section 1 of chapter 196, and allowance for necessities under section 2 of chapter 196, if any, are not charged against but are in addition to the elective share amount.

(b) After the right of election has been exercised by or on behalf of the surviving spouse and the elective share amount has been satisfied, all property or interests in property remaining in the elective estate shall pass to the decedent's beneficiaries other than the Surviving spouse, as if the surviving spouse had predeceased the decedent.

SECTION 9. SATISFYING ELECTIVE-SHARE AMOUNT.

(a) Unless the decedent provides otherwise by will, or unless otherwise provided in section 12 below, or unless the probate court orders otherwise as justice and equity may require, in a proceeding for an elective share, property or interests in property included in the elective estate shall be applied to satisfy the elective share amount in the following order:

(1) Outright Transfers to Surviving Spouse

(A) property or interests in property which were transferred outright to the surviving spouse by the decedent within one year of the decedent's death valued as of the date of transfer;

(B) property or interests in property which pass or have passed outright to the surviving spouse by testate or intestate succession, or which would have so passed to the surviving spouse but for the filing of the petition for an elective share by or on behalf of the surviving spouse;

(C) property or interests in property which pass or have passed outright to the surviving spouse otherwise than by testate or intestate succession but by reason of the decedent's death, including the decedent's interest in joint property in which the surviving spouse held a right of survivorship, or which would have so passed to the surviving spouse but for the filing of the petition for an elective share by or on behalf of the

surviving spouse;

(D) property or interests in property which would have passed outright to the surviving spouse by reason of the decedent's death but were disclaimed.

(2) Trusts for Surviving Spouse. If after the application of subsection (1) the elective share amount is not fully satisfied, property or interests in property included in the elective estate which pass or have passed in trust to the surviving spouse, or which would have so passed to the surviving spouse but for the filing of the petition for an elective share by or on behalf of the surviving spouse, shall be applied to satisfy the elective share amount in the following order:

(A) trusts of which the decedent was a donor and (1) the assets of which may be reached by the surviving spouse acting alone through the exercise of a power of appointment either during life or by will, or (ii) the assets of which are to be paid to the surviving spouse's estate;

(B) trusts of which the decedent was a donor and the surviving spouse is named as the sole beneficiary during the surviving spouse's lifetime.

For purposes of this subsection (2), the term "trust" shall include any interest in property measured by a period of time, including, for example, a life

(3) Other Transfers by Decedent. If after the application of subsections (1) and (2) the elective share amount is not fully satisfied, property or interests in property included in the elective estate, but not including any gifts made within one year of death, shall be applied to satisfy the elective share amount in the following order:

(A) trusts of which the decedent was a donor and which have more than one beneficiary including the surviving spouse during the surviving spouse's lifetime;

(B) property or interests in property which pass or have passed to beneficiaries or recipients other than the surviving spouse outright by testate or intestate succession or otherwise by reason of the decedent's death, including the decedent's interest in joint property with right of survivorship, or in any trust of which the decedent is or was a donor and of which the surviving spouse is not a beneficiary.

(4) Power of Appointment Property. If after the application of subsections (1), (2) and (3) the elective share amount is not fully satisfied, amounts included in the elective estate as defined in

section 1 (c) of this chapter because the decedent possessed one or more powers of appointment shall be applied to satisfy the elective share amount. Said powers of appointment shall be deemed exercised to the extent necessary to give effect to this subsection.

(5) Gifts Made Within One Year of Death. If after the application of subsections (1), (2), (3) and (4) the elective share amount is not fully satisfied, amounts included in the elective estate which have passed to recipients other than the surviving spouse because of any gifts made within one year of death shall be applied to satisfy the elective share amount.

(b) Pro-rata Apportionment; Valuation. If the elective share amount will be fully satisfied by application of less than all assets within any one category set out in the foregoing subsection (a), a portion of each asset within the category shall be allocated in satisfaction of the elective share amount to be determined by a fraction, the numerator of which is the value of the asset and the denominator of which is the value of all assets within the category. The amount so allocated shall not be apportioned between temporary and remainder estates.

Assets distributed in kind shall be valued at the date of distribution, which date shall be set by agreement of the interested parties or, in the absence of such agreement, by order of the probate court.

(c) Interest. Each payment of cash in satisfaction of the elective share amount shall bear interest from the date of the decedent's death, at the rate provided for pecuniary legacies under section 20 of chapter 197 as it may be from time to time amended, or any successor section. Each distribution in kind in satisfaction of the elective share amount shall carry with it the right of the surviving spouse to receive from the distributing party all income (if any) attributable to the

distributed asset or assets between the date of valuation set forth in section 1 and the date of distribution.

(d) Liability of Original Recipients and Beneficiaries. An original recipient or a beneficiary other than the surviving spouse is liable to make contribution toward satisfaction of the elective share amount in accordance with the provisions of the foregoing subsections (a) through (c) inclusive. A person liable to make contribution may choose to give up such property (or a proportional part thereof, as the case may be) or to pay the value of the amount for which the person is liable. No original recipient who shall conform to the standard of a Massachusetts executor or administrator with respect to the care and management of assets included in the elective estate, or who shall hold all such assets in the form in which such original recipient received them, shall be liable to the surviving spouse in an amount greater than the sum of (1) the value of the elective estate assets received by such original recipient, determined as of the date of distribution or payment to the surviving spouse in satisfaction of such liability, and (2) any interest or income due under subsection (c). No beneficiary shall be liable to the surviving spouse in an amount greater than the sum of (1) the value of such beneficiary's share of the elective estate at the date of distribution or payment to the surviving spouse in satisfaction of such liability, and (2) any interest or income due under subsection (c).

(e) Protection of Subsequent Transferees. A person other than an original recipient, a beneficiary, or a payor who, whether for value or as a gift, receives an asset included in the elective estate shall be neither obligated under this chapter to return the asset or any portion thereof nor liable under this chapter for the value of the asset or any portion thereof, regardless of whether at the time such asset was received such person had

notice of the surviving spouse's intention to file a petition for the elective share or notice that a petition for the elective share had been filed, unless the transfer to such person was a fraudulent transfer as to the surviving spouse.

(f) Nonexistence of Liens or Encumbrances. The elective share rights of a surviving spouse under this chapter shall not be construed as imposing a lien or other encumbrance on any personal property included in the elective estate. Nothing in this chapter shall preclude the court from allowing attachments, trustee process or entering case-specific orders for equitable relief in a proceeding for elective share pursuant to section 7 hereof.

SECTION 10. RELINQUISHMENT OF RIGHT TO ELECT.

(a) The right of election may be relinquished by agreement as to the entire elective estate or a portion thereof. A relinquishment by agreement is valid if all of the following conditions are met:

(i) the agreement is in writing;

(ii) the agreement is signed by both spouses;

(iii) the agreement specifically refers to the right of election;

(iv) the surviving spouse is provided full disclosure of the decedent's assets and liabilities as of the date of execution; and

(v) the agreement is fair and reasonable as of the date of execution.

(b) The right of election may be relinquished as to any particular asset or assets if all of the following conditions are met:

(i) the relinquishment is in writing and specifically refers to the right of election under this chapter;

(ii) the relinquishment identifies the asset or assets to which it pertains with reasonable particularity; and

(iii) the relinquishment is signed by the surviving spouse and acknowledged before a notary public.

(c) The provisions of the foregoing section (b) to the contrary notwithstanding, the signature of the surviving spouse to a written consent to the designation of a beneficiary other than the surviving spouse to receive benefits other than a plan intended to be qualified under section 401 of the Internal Revenue Code, or an employee pension plan subject to the provisions of the Employee Retirement Income Security Act of 1974, as amended, provided such consent satisfies the requirements of section 417 of the Internal Revenue Code or section 205 of said Act, as applicable, shall be deemed a valid relinquishment of the right of election as to said benefits.

(d) A relinquishment meeting the requirements of this section shall be valid regardless of surviving spouse before or during the marriage.

SECTION 11. PROTECTION OF PAYORS.

(a) A payor is not liable for having made a payment or transferred an item of property or other benefit included in the decedent's elective estate to a beneficiary designated, in a governing

instrument, or for having taken any other action in good faith reliance on the validity of a governing instrument, upon request and satisfactory proof of the decedent's death, before the surviving spouse, or the surviving spouse's representative has given written notice to the payor, or agent of the payor, by mail or delivery, that (i) the surviving spouse intends to file a petition for an elective share, or (ii) a petition for an elective share has been filed.

(b) A payor is liable for payments made or other actions taken after the surviving spouse or the surviving spouse's representative has given written notice to the payor, or agent of the payor, by mail or special delivery, that (i) the surviving spouse intends to file a petition for an elective share, or (ii) a petition for an elective share has been filed.

(c) Upon receipt of written notice of intention to file a petition for an elective share or written notice that a petition for an elective share has been filed, a payor may pay any amount owed, or transfer or deposit any item of property held by it, to or with the court having jurisdiction of the probate proceedings relating to the decedent's death, or, if no proceedings have been commenced and said court cannot be identified, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's last known address. Payments, transfers, or deposits made to or with the court discharge the payor from all claims for the value of amounts paid to, or items of property transferred to or deposited with the court.

(d) The probate court shall hold and disburse the funds or item of property deposited with it in accordance with the provisions of this chapter.

SECTION 12. REAL ESTATE.

(a) Any third party holding an interest in real estate shall have no obligation under section 9 of this chapter nor have any right or obligation based thereon under the following circumstances:-

(1) if, at the time the third party acquired such interest, the interest was not held of record by the decedent, unless the transfer to the third party was a fraudulent transfer as to the surviving spouse; or

(2) if there is of record a waiver of the right of election as to such interest that satisfies the requirements of section 10, subsection (b) above; or

(3) if the instrument of conveyance by which the third party acquired such interest identifies the decedent as being unmarried at the time of conveyance; or

(4) if such interest was conveyed to a third party purchaser for value; or

(5) if the third party is a bank, licensed mortgage lender, insurance company or other institutional lender and the interest of the third party is that of mortgagee or secured party; or

(6) if the third party acquired such interest as a result of foreclosure, deed in lieu of foreclosure, or otherwise as a result of an exercise of rights under a mortgage or other lien; or

(7) if there is of record (i) an affidavit by the decedent certifying that the real estate in which the decedent transferred an interest was the decedent's residence at the time of the transfer and that the person or persons to whom the decedent transferred such interest were the the person to whom the decedent was married at the time of the transfer, and (ii) a physician's affidavit certifying that as of a date within ten days of the

transfer the person to whom the decedent was married at such date was incapacitated as defined in section 3 of this chapter; or

(8) if the third party acquired such interest prior to the enactment date of this chapter.

(b) Under any of the circumstances specified above in section 12(a) (1-7), and in accordance with section 9(f) of this chapter, (i) the exercise of the elective share right hereunder shall not divest, encumber or have any operation or effect on any interest in real property held by any third party, and (ii) any third party shall hold title to any interest in real property free of the elective share and any right or obligation based thereon.

(c) The provisions of this section shall apply to any interest in real property, direct, indirect, choate, inchoate, beneficial, legal or otherwise. An interest in real property is held of record by the decedent within the meaning of this section only if (i) the records of the registry of deeds or land registration district of the Land Court for each of the districts where the real property lies contain a deed or other instrument of conveyance indexed in the chain of title to the real property, vesting title to the interest in the decedent, or (ii) if the decedent has acquired and holds title to the interest by testate or intestate succession, as demonstrated by records of the appropriate Registry of Probate which are indexed and available within the chain of title to the real property. In no

event shall the interest be deemed to be held of record by a decedent solely because the decedent holds title as trustee of any form of trust, including a nominee or realty trust.

(d) Any person interested in title to real property shall be entitled to rely conclusively and without further investigation upon any written representation of record by the decedent that the

550 decedent is unmarried or any written representation of record by a person that such person is the
551 decedent's spouse. A waiver of the right of election as to any specific real property or interest
552 therein (i) shall be deemed to identify such real property or interest with reasonable particularity
553 if it refers to such interest by any form of legal description, by reference to real property
554 described in the same or other instruments or plans of record, by street address or location, by tax
555 assessment references, or in any other manner reasonably calculated to identify such real
556 property or interest therein) (ii) shall be valid whether recorded, signed, dated, or delivered
557 before, on, or after the date on which the third party acquired such real property or Interest
558 therein; and (iii) shall be valid whether contained in or appended to an instrument of conveyance
559 or other instrument of record affecting title to such real property or in a separate certificate or
560 other instrument of record.

561 (e) An attorney, settlement agent, or other person representing or otherwise acting on behalf of
562 any third party shall have no duty arising by operation of law by reason of such representation or
563 action, to advise, explain, describe, or make any disclosure concerning the legal or financial
564 consequences of executing and/or delivering a waiver prepared pursuant to the requirements of
565 section 10, subsection (b) above.

566 SECTION 13 EFFECTIVE DATE.

567 This act shall be effective for estates of persons dying on or after January one, two thousand
568 nine.